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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 507

MABEL DAVIS JAMES, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, Mabel Davis James, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINION BELOW

The opinion of the court of appeals is reported at — F. 2d — and is reprinted in Appendix A, *infra*, pp. 1a-11a, and at pages 40-49 of the record. There was no opinion in the United States District Court for the District of Arizona. Rather there was simply an order (R. 25) and the entry of summary judgment (R. 27).

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1964 (R. 50). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The court of appeals decided the case expressly as a constitutional question.

QUESTIONS PRESENTED

Whether a widow's allowance, paid under Arizona statutory law, constitutes "income" within the meaning of that term as used in the Sixteenth Amendment to the Constitution of the United States, and, if the answer to the first question is yes, whether the Congress intended in the Internal Revenue Code of 1954 to tax a widow's allowance as income.

CONSTITUTIONAL AMENDMENT INVOLVED

The Sixteenth Amendment to the Constitution of the United States reads as follows:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

STATUTES INVOLVED

The pertinent provisions of the Arizona statutes involved are found in Appendix C, *infra*, p. 12a.

STATEMENT

Sections 513 and 515 of Title 14, Arizona Revised Statutes (App. C, *infra*, derived from California law, *Estate of Nolan*, 56 Ariz. 366, 373, 108 P. 2d 385, 388) provide for the payment of a widow's allowance during the settlement of an estate. Petitioner was paid

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such widow's allowance during 1956 and 1957. The Commissioner of Internal Revenue determined that such allowance constituted income. After assessment and payment of asserted deficiencies, a suit for refund was filed. The district court, having been cited to *Buck* v. *McLaughlin*, 48 F. 2d 135 (9th Cir., 1931) and *MacMurray* v. *Commissioner*, 16 T.C. 616, both of which held that the payment to a widow of a widow's allowance under California law is not "income" within the meaning of that term as used in the Constitution, whether paid out of estate corpus or income, granted petitioner's motion for summary judgment. (R. 25, 27).

The court of appeals, after overruling in part its 1931 decision in *Buck* v. *McLaughlin, supra,* on the basis of later decisions of this court, reversed the district court and held that a widow's allowance, paid pursuant to Arizona law, is income to the recipient within the meaning of that term as used in the Sixteenth Amendment where the state court order provides that such widow's allowance be paid out of what was income to the estate. (App. A, *infra*, p. 10a, R. 48). That is, the court of appeals ruled in effect that the nature of an item, whether income or not, within the meaning of the Sixteenth Amendment, is determined by reference to its nature in the hands of the payor or distributor.[1]

[1] After first stating that "The taxpayer is also correct in stating that the mere fact that money received by A from B, (B in this case being the estate) comes from taxable income of B does not mean that A has received taxable income", the court of appeals then proceeded to "conclude" that "under the modern concept of 'income' there can be no constitutional barrier to taxing the widow's allowance, *at least* where the terms of the state court order provide that it *be paid out of the income of the estate.* That is all that is before us."

Having concluded that a widow's allowance does constitute income within the meaning of that term as used in the Sixteenth Amendment, the court of appeals then ruled that Congress in the Internal Revenue Code of 1954 intended to tax a widow's allowance as income to the recipient if paid from an estate's income.

Petitioner seeks a review of both rulings.

REASONS FOR GRANTING THE WRIT

The recent fate of taxpayers in this Court has been horrendous. This is true both with respect to the percentage of taxpayer petitions denied and the final decision on those granted. In the Annual Report of the Attorney General of the United States For the Fiscal Year Ended June 30, 1963 at page 317, the Government boasts that:

> ". . . The Government petitioned in only 8 [tax] cases, of which 4 were granted. Taxpayers sought review in 86 cases, of which 80 were denied. The [Supreme] Court decided 9 tax cases on the merits —*all for the Government.*" (Italics supplied)

That is, a maximum of 7% of all taxpayer petitions were granted whereas 50% of all Government petitions were granted. And even more important, the Court ruled in the Government's favor 100% of the time on the merits.

In the face of such a record, Petitioner is compelled not only to ask the Court to weigh carefully her reasons why a writ should issue herein, but also to reconsider the very criteria which it is using to rule on petitions and the merits of tax cases.[2] The instant case is

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[2] Should the Court decline to do so, then this taxpayer, as well as all other taxpayers, have been placed in the untenable position of having only a 7% chance of being heard, and a 0% chance of prevailing if heard.

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a good one for such a re-examination because it presents two important questions which should be decided by this Court, namely:

(1) whether a widow's allowance constitutes income to the recipient widow within the meaning of the term "income" as used in the Sixteenth Amendment.

(2) whether, if the answer to question (1) is yes, the Congress intended in the Internal Revenue Code of 1954 to tax a widow's allowance as income if the allowance was paid from an estate's income.

Obviously the above questions are recurring ones.[3] And because the issues affect thousands of widows throughout the country, the amount of tax dollars is significant particularly to those widows whose income was entirely dependent upon a deceased husband. That the issues are considered important and of national interest is shown partially by the publication of the court of appeals decision in an Associated Press story carried by a New Orleans daily newspaper. (App. B, *infra*, p. 11a)[4]

What the court of appeals did was overturn a legal principle which for over a third of a century has been followed by the federal courts[5] and the U.S. Internal

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[3] To conclude otherwise would require an assumption either that widows and their legal representatives in the other circuits will accept the decision of the court of appeals below, or that the Government will change its mind and not tax such payments as income in the other circuits in which event the decision herein should not be permitted to stand.

[4] The court of appeals' decision has been reported and discussed in 103 Trusts and Estates 719 (July, 1964).

[5] *Buck* v. *McLaughlin*, 48 F. 2d 135 (9th Cir., 1931); *Mac Murray* v. *Commissioner*, 16 T.C. 616 (1951).

Revenue Service.[6] The rule had been that a widow's allowance, whether paid from an estate's corpus or income, did not constitute "income" as that term was used in the Sixteenth Amendment. Such a rule, although enunciated in the legalisms of the law, actually expressed a deep seated national policy of extending a helping and kindly hand to those who are in the midst of one of life's most difficult moments both as to its emotional and its economic effects. Such rule also gave full rather than niggardly effect to state social and economic policy.

By its decision herein, the court of appeals has not only cut down an important segment of those economic and social benefits intended by the states and the national government, but it has rendered a decision which seriously misconceives and misconstrues the Sixteenth Amendment, the Internal Revenue Code of 1954, and the decisions of this Court.

More specifically, the reasons for granting the writ are as follows.

I

The Issues Herein Are Recurring Ones, Are Important, Involve Large Numbers of Taxpayers and Substantial Amounts of Tax Revenue, and Can be Expected to Generate a Great Volume of Tax Controversy

Although the instant case is one of first impression, as recognized by the court of appeals (App. A, *infra*, p. 6a; R. 44), the constitutional and statutory issues involved are substantial and important. "Courts in a substantial majority of the states have been given

[6] The Commissioner of Internal Revenue has acquiesced in the decision in *MacMurray* v. *Commissioner*, 16 T.C. 616 (1951). 1951-2 Cum. Bull. 3.

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power to grant allowances to widows for their support during all or a part of the period prior to estate distribution."[7] Among these states are Alabama, California, Colorado, Illinois, New Jersey, Ohio, Texas, and Washington.[8] As a result, a large percentage of the widows of the hundreds of thousands of American husbands who die each year are affected by the issues here. There are nine other circuit courts of appeals, the U.S. Court of Claims, and the Tax Court of the United States which now must face the problem unless it is assumed that widows living outside of the Ninth Circuit will concede the issues to the Government. That they will do so is an unrealistic assumption since recent history shows that widows and their legal representatives litigate fully those tax issues relating to widow's allowances. "There has been more litigation on the eligibility of widow's allowances for the marital deduction than on any other single issue under Section 2056 of the Internal Revenue Code."[9] Indeed the litigation was so insistent that this Court granted the first certiorari in a widow's allowance matter on October 28, 1963. *Jackson* v. *United States,* 375 U.S. 894 (1963).

That the situation may be expected to generate a great volume of tax controversy, which would inevitably add to the burden of already overcrowded court dockets, is also evident when it is remembered that the tax involved to each of these thousands of widows is

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[7] Bush, *Widow's Exemption or Allowance and the Marital Deduction,* N.Y.U. 22nd Inst. on Fed. Tax. 1131, 1132.

[8] III Vernier's, American Family Law § 278, Table CIX at 638 et seq.

[9] Bush, *Widow's Exemption or Allowance and the Marital Deduction,* N.Y.U. 22nd Inst. on Fed. Tax. 1163.

likely to exceed the tax involved to each of the recipients of strike benefit payments[10] which latter case was petitioned to this Court by the Government on this ground.[11]

And that the issues are recurring ones just as likely to be disputed by widows as it was likely that the Government's strike benefit payments stand would be disputed by the recipients of such payments is self evident.

From the foregoing it is clear that the case presents issues which are important, recurring, involve substantial sums of tax dollars, and can be expected to generate a great volume of tax controversy, unless they are resolved by this Court.

II

The Court of Appeals Has Misconstrued Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955) and Misapplied the Principles Set Forth Therein

This Court's decision in *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, did not hold that every species of receipts constitutes gross income within the meaning of the term "income" as found in the Sixteenth Amendment. Instead, it held, after clearly rejecting definitions of income as a way of solving the problem, that money received as exemplary damages for fraud or as the punitive two-thirds portion of a treble-dam-

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[10] The number of widows far exceeds the number of men receiving strike benefit payments, and the dollars paid out for widow's allowances exceeds the small sums paid in strike benefit payments. For example, Allen Kaiser, the taxpayer in *United States* v. *Kaiser*, 363 U.S. 299 (1960), received only $565.54 in strike benefit payments during 1954. 363 U.S. at 302.

[11] *United States* v. *Kaiser*, October Term, 1959, No. 55, Petition For Writ of Certiorari, at 4, 5.

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age antitrust recovery constitutes income under § 22 (a) of the Internal Revenue Code of 1939.

The opinion stated, among other things, that the receipt of such items were instances of undeniable "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." Does it follow then that, despite the Court's refusal to rely on definitions of income, it merely substituted another definition to the effect that income means all accessions to wealth which are clearly realized and over which the taxpayers have complete dominion?[12] That is, did this Court, which saw the dangers of defining one high level abstraction (income) by equating it with another high level abstraction (the definition found in *Eisner* v. *Macomber*, 252 U.S. 189, 207), do the very same thing in the *Glenshaw* case, *supra*? Petitioner submits it did not.

If it did not, then the court of appeals had the responsibility and duty to analyze and examine the nature of a widow's allowance and the concept of income to determine whether the former is income under the Sixteenth Amendment. It could not shortcut this responsibility by simply defining income as an accession to wealth, as it did, and then concluding, without any reasoning and sub silentio, that a widow's allowance is an accession to wealth.

Here the court of appeals either ruled that income, as used in the Sixteenth Amendment, means all accessions to wealth, which is error, or that a widow's allow-

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[12] The next to last sentence in the opinion shows that the Court was not attempting to define "income" as found in the Sixteenth Amendment when it said: "We would do violence to the plain meaning of the statute and restrict a clear legislative attempt to bring the taxing power to bear upon all receipts constitutionally taxable were we to say that the payments in question here are not gross income."

ance is income to the widow under the Sixteenth Amendment if paid from an estate's income because the sum was income in the hands of the distributor estate. If the court of appeals based its decision on the latter ground, then it was equally in error as it conceded in its opinion when it stated:

> "The taxpayer is also correct in stating that the mere fact that money received by A from B, (B in this case being the estate) comes from taxable income of B does not mean that A has received taxable income." (App. A, *infra*, p. 5a, R. 43)

Since the court of appeals gave only the above two reasons for its holding, it is clear that no light whatsoever has been shed on the question of why a widow's allowance, if paid from an estate's income, is income to the widow under the Sixteenth Amendment. All that can be gleaned from the opinion is that a widow's allowance, if paid from an estate's income, is income to the widow because (1) it is income, or (2) it is an accession to wealth.

The question below was not *who* pays tax on an estate's income, as was urged by the Government, but *whether* a widow's allowance, if paid from an estate's income, is income to the widow. And the latter question cannot be answered by arguing that the Congress has the power to decide *who* shall pay tax on an estate's income.

That there was such a blurring of important and fundamental distinctions is not wholly due to the court of appeals. The district court determined that a widow's allowance is not income (*whether*), and that decision was appealed by the Government on the ground that Congress has power to determine *who* must

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pay tax on an estate's income (thereby begging the question of whether the payment is or is not income to the widow under the Sixteenth Amendment). Thus, it was not unnatural that a court of appeals would rule that *whether* a widow's allowance is income is answered in the affirmative if it (the widow's allowance) was income to someone else (who).

Therefore, this Court should remove some of the confusion which has been created by the court of appeals decision and opinion.

III

The Decision of the Court of Appeals is in Conflict With This Court's Decision in Tank Truck Rentals v. Commissioner, 356 U.S. 30 In That It Has Frustrated the Public Policy of the States Authorizing Widow's Allowances

In *Tank Truck Rentals* v. *Commissioner,* 356 U.S. 30, the Government argued that the taxpayer therein should not be allowed to deduct from gross income a fine paid for violation of *state* maximum weight laws because such a tax decision would frustrate the sharply defined public policy of the *state.* That is, since the taxpayer had paid the fine and could only obtain a partial recovery thereof as a result of obtaining an income tax deduction, it is obvious that the Government was arguing that state policy was being partially frustrated if the taxpayer obtained a deduction. This had to be the case because the taxpayer would still bear a significant portion of the state fine even if the federal deduction was allowed.

This Court approved the Government's argument, and ruled that:

> "... Such a course cannot be sanctioned, for *judicial deference* to state action requires, wherever

possible, that a state *not* be thwarted in its policy . . ." (Italics supplied)

Here the court of appeals' decision is in conflict with *Tank Truck Rentals, supra,* since it did not defer to the policy of the Arizona Legislature that widows must be helped at the death of their husbands. And just as in *Tank Truck Rentals, supra,* the frustration of Arizona policy occurred as a result of a taking away of only a part of the effect of the state's policy.

It cannot be disputed that the policy of the states in allowing a widow's allowance is beneficient, and is intended to protect and preserve the widow and her family during the administration of an estate. It is described in *Bell's Estate,* 139 Pa. Super. 11, 10 A. 2d 835, 836 as "not an inheritance" but "wholly a *gratuity.*" The policy of the states is to aid, protect, and help the widow and her family during the few months when her husband's estate is being administered. Therefore, by virtue of the same reasoning applied in *Tank Truck Rentals, supra,* the taking away of a significant portion of that help in the form of tax frustrates the policy of these states, just as surely as state policy would be frustrated if a tax deduction were granted for a fine paid to a state. Judicial deference requires that, unless a clear cut national need for the last penny of revenue compels a court to conclude that "income" (an abstraction) must include a widow's allowance, the policy of these states should be given *full* effect, as this Court decided in *Tank Truck Rentals, supra.* It is true in *Tank Truck Rentals, supra,* the effect of the Court's rationale was to allow the Government to collect tax. But there was nothing in the rationale that indicated that a state pol-

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icy would be given effect in a tax case only where the result was to collect more tax for the Government.

True, the policy of the states may have to be considered in the light of the policies of the Government. However, when this is done here, it cannot be said that it is the Government's policy of drawing the last ounce of economic blood from widows. Nor can it be said that the Government would falter, much less collapse, if widows continue to receive the helping hand of the Government as well as the states. And a desperate drive to collect all of the tax revenue possible is surely not the Government's policy at a period when tax cuts are being urged by its economists, the Congress, and the President.

Therefore, the only consideration which might be deemed to constitute an important Government policy requiring that the policy of the states be overridden here would be the existence of some definition of income that clearly and irresistably required the conclusion by the Judiciary that a widow's allowance is "income" within the meaning of the term as used in the Sixteenth Amendment. But since the Court has ruled that the answer to the question of what is income cannot be found in definitions, there is no overwhelming Government policy, based on the importance of maintaining a definition or precedent, that can be said to outweigh state policy with respect to widow's allowances.

As a result of the foregoing, it can be seen that, due to the lack of clear cut precedents and definitions respecting the term "income", a decision not to review the instant case actually constitutes a conscious choice by the Court of a national policy which will continue

to defeat the policy of the states respecting widow's allowances. This is true regardless of what may or may not be the legal effects of a refusal to review. And the same kind of a judgment will also be made by the Government when it decides whether to join or oppose the petition herein.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18,456

UNITED STATES OF AMERICA, *Appellant*,

v.

MABEL DAVIS JAMES, *Appellee*.

[June 18, 1964]

Appeal from the United States District Court
for the District of Arizona

Before: CHAMBERS, POPE, BARNES, HAMLEY, JERTBERG, MERRILL, KOELSCH, BROWNING and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

The government asks us to overrule our decision in *Buck* v. *McLaughlin*, 9 Cir., 1931, 48 F.2d 135. An alternative ground of decision in that case was that a widow's allowance paid to her out of her husband's estate under court order, pursuant to California law, is not "income" within the meaning of Amendment XVI to the Constitution. The questions presented by this case are narrower. Here, the widow's allowance was ordered in an Arizona estate, and was expressly made payable out of the income of the estate. The estate had income ample to cover the payments ordered, and there is no evidence that the allowance was not in fact paid out of that income. Under these circumstances, we must presume that it was. The years in question are 1956 and 1957.

There are two questions that we must decide: Did Congress attempt to tax the widow under these circumstances? If so, was what she received income under the Constitution? We answer both questions in the affirmative.

Section 61 of the Internal Revenue Code of 1954 (26 U.S.C. § 61)[1] defines gross income as "all income from whatever source derived, including (but not limited to) the following items:

. . . .

(15) Income from an interest in an estate or trust."

It has been held that, by the enactment of the predecessor of this section, Congress intended "to exert in this field 'the full measure of its taxing power.'" (*Commissioner* v. *Glenshaw Glass Co.*, 1955, 348 U.S. 426, 429) Congress has specifically expressed in subsection (15) an intent to tax the estate's income. Has it expressed an intent to tax it to the widow rather than the estate, when a part of the estate's income was, by order of the court, transferred to her?

Congress has expressly enacted that "Gross income does not include the value of property acquired by gift, bequest, devise or inheritance." (Section 102(a)). But this provision does not exclude from "gross income" (1) the income from such property or, "(2) where the gift, bequest, devise or inheritance is of income from property, the amount of such income." (Section 102(b)(1) and (2)). The section further provides: "Where, under the terms of the gift, bequest, devise or inheritance the payment . . . thereof is to be made at intervals, then, to the extent that it is paid . . . out of income from property, it shall be treated for purposes of paragraph (2) as a gift, bequest, device or inheritance of income from property. Any amount in-

[1] All references, unless otherwise indicated, are to the Internal Revenue Code of 1954, as it appears in 26 U.S.C., 1958 ed.

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cluded in the gross income of a beneficiary under subchapter J shall be treated for the purposes of paragraph (2) as a gift, bequest, devise or inheritance of income from property."

The pertinent provisions of subchapter J, Part I of which deals with "Estates, Trusts and Beneficiaries," are: § 643 (c) "For the purposes of this part, the term beneficiary includes heir, legatee, devisee." § 661(a) "Deduction—In any taxable year there shall be allowed as a deduction in computing the taxable income of an estate . . .

"(1) any amount of income . . . required to be distributed currently; (including any amount required to be distributed which may be paid out of income or corpus to the extent such amount is paid out of income for such taxable year); . . ." § 662(a) "Inclusion—Subject to subsection (b), there shall be included in the gross income of a beneficiary to whom an amount specified in section 661(a) is paid . . . (by an estate . . . described in section 661), the sum of the following amounts:

"(1) Amounts required to be distributed currently.—The amount of income for the taxable year required to be distributed currently. . . ." This "includes any amount required to be paid out of income or corpus to the extent that such amount is paid out of income for such taxable year."

§ 662(b) "Character of Amounts—The amounts determined under subsection (a) shall have the same character in the hands of the beneficiary as in the hands of the estate . . . ."

The Treasury regulations (1954 Code) contain the following applicable provisions:

23 C.F.R., Sec. 1.102-1

"(d) Effect of subchapter J.

Any amount required to be included in the gross income of a beneficiary under sections . . . 662 . . . shall be treated for the purposes of this section as a gift, bequest, devise or inheritance of income from property . . . ."

23 C.F.R. Sec. 1.661(a)-2

"(e) The terms 'income required to be distributed currently' and 'any other amounts properly paid or credited or required to be distributed' do not include amounts required to be paid by a decedent's estate pursuant to a court order or decree as an allowance or award under local law for the support of the decedent's widow or other dependent for a limited period during the administration of the estate, except to the extent such amounts are payable out of and chargeable to income under the order or decree or local law. * * *"

We have deliberately omitted any reference to those portions of the code and the regulations that establish the concept of "distributable net income" because here we deal with income of the estate actually paid to the widow, and those provisions deal with income that is treated as if paid to the beneficiary, even though it can be shown that the actual payment is from principal. We need not consider such provisions, and express no opinion as to their applicability to a widow's allowance.

The taxpayer's contention is that sections 643(c), 661(a), and 662(a) and (b) do not purport to tax, in the hands of the widow, that part of her allowance that is paid to her, by court order, out of estate income. She urges that the regulation (Sec. 1.661(a)-2, *supra*), to the extent that it may purport to do so, is invalid. Actually, the regulation deals with a deduction by the estate, not with taxability to the widow. Taken in connection with section 662, however, it implies that the income here in question is taxable to her.

The taxpayer says that the widow is not a "beneficiary" within the meaning of either the statute or the regulations,

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noting that the statute merely says that the term "includes heir, legatee, devisee," and that the widow is none of these. The taxpayer is also correct in stating that the mere fact that money received by A from B, (B in this case being the estate) comes from taxable income of B does not mean that A has received taxable income. Thus if B uses its income to pay the principal of a debt owing to A, A does not thereby receive taxable income.

Against these contentions, however, there are a number of considerations. First, there is the all-inclusive effect of section 61, as indicated by the Supreme Court in *Glenshaw Glass Co., supra.* When a person receives what would ordinarily be considered income, he is subject to tax unless Congress has said that he is not. Second, there is section 7701(b) of the code which reads:

> "Definitions.
>
> "(b) Includes and Including—The terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined."

This materially weakens the taxpayer's argument as to the effect of section 643. We think that the widow's position is much closer to that of a "beneficiary" of the estate than to that, for example, of a creditor.[2] She gets the allowance only by reason of her husband's death; she is entitled to it because of her status as widow; she receives it from his estate. Third, there is the fact that section 102 does not expressly exclude from "gross income" the value of property acquired by the widow as family allowance. We leave to a more appropriate case the question of whether it does so by implication. But, even if it does, it would still not exclude income of the estate paid to her (§ 102(b)).

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[2] Compare our discussion of family allowance and the estate tax in *Cunha's Estate* v. *C.I.R.*, 9 Cir., 1960, 279 F. 2d 292; *Jackson* v. *United States*, 9 Cir., 1963, 317 F. 2d 821.

Perhaps most persuasive is the general scheme of the statute, which contemplates taxation of the estate's income to it, when retained by it, and to a "beneficiary" when distributed to the "beneficiary," such payment being then deductible by the estate. (Again we need not discuss the concept of "distributable" income, other than to note that it is a means of implementing the scheme while eliminating the necessity of tracing dollars). On the whole, we conclude that the statute does tax to the widow income of the estate required to be paid and actually paid to her as family allowance. We go no further than the facts of this case require.

The remaining question is whether Congress has power to tax to the widow the income of the estate required to be paid to, and received by, her as family allowance. We have no doubt that it does.

In *Buck* v. *McLaughlin, supra,* we held that money paid by an estate to a widow as her "family allowance" was not taxable to her as income. No differentiation was made between principal and income as the source of the allowance. No other Court of Appeals has passed upon the question, nor has the Supreme Court. Our decision was based upon alternative grounds. The first is that, the widow's right to a family allowance under California law being statutory, and the allowance being payable out of income or corpus regardless of any other right she may have in the estate, it was analogous to alimony, which had then been held not to be taxable income by the Supreme Court in *Gould* v. *Gould,* 1917, 245 U.S. 151. The second was that, under the definition of "income" adopted by the Supreme Court in *Eisner* v. *Macomber,* 1920, 252 U.S. 189, the family allowance was not income within that term as used in the Sixteenth Amendment.

The Sixteenth Amendment uses, but does not purport to define, the term "income." Nor do the early income

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tax statutes attempt a comprehensive definition of the term. The *Eisner* definition is:

> "'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets . . . ." 252 U.S. at 207.

On the same page, the Court sought to elucidate the principle thus expressed:

> "Here we have the essential matter: *not* a gain *accruing* to capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value proceeding from the property, *severed from* the capital however invested or employed, and *coming in*, being *'derived'*, that is, *received* or *drawn* by the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. Nothing else answers the description." (Emphasis by the Court)

At the time that the *Buck* case was decided, the *Eisner* definition might still have been thought to state good law. It had been frequently cited with approval by the Supreme Court in the decade following its formulation, though an analysis of results reached in the later cases might have suggested that it was most often honored in the breach.

But a few months after *Buck*, the Supreme Court hinted broadly that the definition had outlived its usefulness. The case was *United States* v. *Kirby Lumber Co.*, 1931, 284 U.S. 1. The question was whether a corporation which issued its own bonds at par, then repurchased at less than par on the open market, received income in the amount of the difference in price. *Eisner* v. *Macomber* was not cited. In holding the gain to be taxable income, Mr. Justice Holmes, for a unanimous Court said:

> "We see nothing to be gained by discussion of judicial definitions. The defendant in error has realized within

> the year an accession to income, if we take words in their plain popular meaning, as they should be taken here." 284 U.S. at 3.

This informal approach to the problem was consistent with Holmes' dissenting view in *Eisner:* "I think that the word 'income' in the Sixteenth Amendment should be read in 'a sense most obvious to the common understanding at the time of its adoption.' "

Mr. Justice Cardozo returned to the theme a few years later. Speaking for the Court in *United States* v. *Safety Car Heating Co.*, 1936, 297 U.S. 88, 99, he said:

> "Income within the meaning of the Sixteenth Amendment is the fruit that is born of capital, not the potency of fruition. With few exceptions, if any, it is income as the word is known in the common speech of men."

The *Eisner* definition of income was expressly distinguished and limited for the first time in *Helvering* v. *Bruun*, 1940, 309 U.S. 461. The taxpayer had leased certain property for a term of 99 years. The lease provided that the lessee should make certain improvements, which would revert to the lessor on termination of the lease. The lessee tore down an old building and built a new one. He then defaulted on the lease, and the property reverted to the taxpayer. The government sought to tax as income the net increase in fair market value of the new building over the old one. The taxpayer argued that, since the building had value only as "bricks, iron and mortar" if severed from the land, it was merely an accretion to capital, and not income. Mr. Justice Roberts noted that the taxpayer relied upon "certain expressions found in the decisions of this court dealing with the taxability of stock dividends." (Citing *Eisner* in a footnote). He distinguished them:

> "These expressions, however, were used to clarify the distinction between an ordinary dividend and a stock

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dividend. They were meant to show that in the case of a stock dividend, the stockholder's interest in the corporate assets after receipt of the dividend was the same as, and inseverable from that which he owned before the dividend was declared. We think they are not controlling here." 309 U.S. at 469.

The *Eisner* definition was finally laid to rest in *Commissioner* v. *Glenshaw Glass Co., supra,* which concerned the taxability as income of money recovered as punitive damages in legal actions. Appellees characterized the recovery of these funds as a "windfall." With commendable tenacity, they argued that the income provisions of the revenue code could not be read so broadly as to include these sums in income, because *Eisner* v. *Macomber* had defined income as the product of capital or labor, and these were neither.

Chief Justice Warren brushed the argument aside:

"The Court was there endeavoring to determine whether the distribution of a corporate stock dividend constituted a realized gain to the shareholder, or changed 'only the form, not the essence,' of his capital investment . . . . It was held that the taxpayer had 'received nothing out of the company's assets for his separate use and benefit. . . . The distribution, therefore, was not a taxable event. In that context—distinguishing gain from capital—the definition served a useful purpose. But it was not meant to provide a touchstone to all future gross income questions . . . .

Here we have instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion . . ." (348 U.S. at 430-31)

The latter language is clearly applicable to the case now before this Court.

Eisner v. *Macomber* is still good authority for the question that it decided, namely, that a stock dividend is not income to the shareholder, at least if the stock is of the

same class and in the same corporation as that previously held by the taxpayer. But insofar as it purported to offer a comprehensive definition of the term income as used in the Sixteenth Amendment, it has been discarded. No Supreme Court case since *Glenshaw Glass* has cited it for its discussion of the income question.

A good summary of the situation may be found in Surrey and Warren, The Income Tax Project of the American Law Institute: Gross Income, Deductions, Accounting, Gains and Losses, Cancellation of Indebtedness, 66 Harv. L. Rev. 761, 770-71 (1953):

> "Essentially, the *Eisner* v. *Macomber* statement is a generalization rather than a definition.
>
> • • •
>
> "The Supreme Court has recognized the futility of attempting to capture the concept of income and confine it within a phrase. In *United States* v. *Kirby Lumber Co.* the Court explicitly abandoned the search for a definition, and succeeding cases have not revived the search. The courts have given a wide scope to the income tax, but have realized that the borderline content of 'income' must be determined case by case. Essentially the concept of income is a flexible one, with the result in a particular case being determined by the interplay of common usage, accounting concepts, administrative goals, and finally judicial reaction to these forces. Each force and judicial reaction in turn reflects an underlying judgment as to what types of receipts should be subject to a tax imposed on 'income'."

To the same effect is 1 Mertens, Law of Federal Income Taxation § 5.03, (1962).

Clearly the constitutional basis for *Buck* v. *McLaughlin* has been discredited. It would seem just as clear that, under the modern concept of "income", there can be no constitutional barrier to taxing the widow's allowance, at least where the terms of the state court order provide that

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it be paid out of the income of the estate. That is all that is before us.

The alternative ground of the *Buck* case is no longer valid. Many courts, including this one, have determined that alimony is taxable to the recipient wife under present day statutes, and that *Gould* v. *Gould* was merely declarative of the law under older statutes, and did not have a constitutional basis. We think that the analogy that was drawn in *Buck* between alimony and family allowance is still a useful one. In upholding the tax on alimony payments to the wife, now expressly covered by section 61(8), we held that Congress had the power to require that the tax on the income shall fall on the ultimate recipient rather than the one who earned it. See *Fairbanks* v. *Commissioner,* 9 Cir., 1951, 191 F.2d 680, 681. That holding is equally applicable here.

To the extent that *Buck* v. *McLaughlin* is inconsistent with our decision in this case, and to that extent only, it is overruled. The judgment is reversed.

APPENDIX B

Income Tax Rule Affects Widows

San Francisco (AP)—Widows must pay income tax on allowances from their deceased husbands' estates, the United States Court of Appeals ruled Friday.

The decision—by all nine of the active judges—overturned a court verdict that had stood since 1931.

The Department of the Treasury sought the ruling against Mabel Davis James of Phoenix, Ariz. No decision on this subject had been handed down by any court since 1931.

But the appeals court judges said recent Supreme Court rulings had knocked out the foundation for the distinction between alimony and family allowance.

APPENDIX C

Arizona Revised Statutes, Sec. 14-513:

> "When a person dies leaving a widow or minor children, the widow or children, until letters are granted and the inventory returned, may remain in possession of the homestead, all wearing apparel of the family, and all the household furniture of decedent, and they are also entitled to a reasonable provision for their support to be allowed by the court."

Arizona Revised Statutes, Sec. 14-515:

> "A. If the amount set apart is insufficient for support of the widow and children, or either, the court shall make an allowance out of the estate as is necessary for maintenance of the family according to their circumstances during the progress of the settlement of the estate, which, in case of an insolvent estate, shall not be more than one year after granting letters testamentary or administration.
>
> B. The allowances shall be paid in preference to all other charges, except funeral charges and expenses of administration, and may, in the discretion of the court, take effect from the death of the decedent."

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 507

MABEL DAVIS JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court, entering a summary judgment for the taxpayer (R. 27),[1] did not write an opinion. The opinion of the Court of Appeals (Pet. 1a-11a) is reported at 333 F. 2d 748.

JURISDICTION

The Court of Appeals entered judgment on June 18, 1964. (R. 50.) The petition for a writ of cer-

[1] Citation is to the Transcript of Record in the Court of Appeals which is on file with the Clerk of this Court.

tiorari was filed on September 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

QUESTIONS PRESENTED

1. Whether amounts paid as a widow's allowance, under a State court order providing for periodic payments from the income of an estate, are taxable as income to the recipient under Section 662 of the Internal Revenue Code of 1954.
2. Whether such a tax is constitutional.

STATUTES INVOLVED

The relevant sections of the Internal Revenue Code of 1954 are set out in the Appendix, *infra*, pp. 6-8.

STATEMENT

Oliver B. James died on April 20, 1955, survived by his wife, Mabel Davis James, the taxpayer and petitioner herein. (R. 13.) She and the Valley National Bank of Phoenix, acting as co-executors of the decedent's will, petitioned the Superior Court of Maricopa County, Arizona, for a support allowance for the taxpayer in the amount of $2,000 a month from the time of the death of the deceased until further order of the court. (R. 13-14.) The petition stated "that said family allowance to said widow should be paid out of the income of said estate" which was estimated at $100,000 a year. (R. 13-14.)

On June 1, 1955, the State court entered an order awarding the taxpayer the requested support allowance. The order provided in part as follows (R. 20):

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> Now, Therefore, It Is Hereby Ordered that the sum of Two Thousand Dollars ($2000.00) per month is allowed from the income of the estate of Oliver B. James, deceased, for the maintenance of Mabel Davis James, widow of said deceased, from the date of death of said deceased, and said Co-Executors are hereby ordered to pay said sum out of the income of said estate to Mabel Davis James, the widow of the deceased, from and after April 20, 1955, the time of the death of said deceased, and continuing until the further order of the Court.

The taxpayer received from the estate $18,000 in the taxable year 1956 and $6,000 in the taxable year 1957 as a family allowance. (R. 16.) The Commissioner of Internal Revenue assessed a deficiency of $13,398.71 for the taxable year 1956 as a result of the failure of the taxpayer to include in her reported income for that period the $18,000 payment received. (R. 5.) The taxpayer included the $6,000 payment received in her reported income for the taxable year 1957. (R. 8.)

The taxpayer paid the tax due on both payments (R. 5, 7), filed a claim for refund (R. 5, 8), and instituted this action on November 10, 1960, seeking a refund of the tax paid (R. 9). The District Court granted summary judgment in favor of the taxpayer (R. 27). This decision was reversed by the Court of Appeals sitting *en banc*. (R. 50.)

ARGUMENT

1. The basic principle underlying the taxation of estates (and trusts) is that all of the taxable income

of an estate is to be taxed either to the beneficiaries or to the estate, or part to each. Under the Internal Revenue Code of 1954, the entire income of an estate is initially attributed to the estate as a separate taxable entity;[2] the estate is then allowed a deduction for amounts required to be distributed currently to any beneficiary;[3] and, finally, those amounts of distributed income are then taxed to the recipient.[4] Each beneficiary who is entitled to receive current distributions out of what is considered income from the estate under local law[5] is taxed on this amount so long as the total of such distributions does not exceed what is determined under Section 643(a) to be the "distributable net income" of the estate—*i.e.*, the taxable income of the estate with certain modifications. Certain other receipts by beneficiaries are also taxed, but they are not involved in this case.

In the instant case, the taxpayer received current payments out of the income of the estate by virtue of State law. She was thus a statutory beneficiary of the estate, and, accordingly, as the Court of Appeals held (Pet. 6a), the amount she received was includible in her return as an "amount of income for the taxable year required to be distributed currently." Section 662(a)(1).

2. The tax imposed upon the recipient of a widow's allowance by Section 662 is plainly a tax upon income

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[2] Section 641 (App., *infra*, p. 6).

[3] Section 661 (App., *infra*, p. 7).

[4] Section 662 (App., *infra*, pp. 7-8).

[5] See Section 643(b) (App., *infra*, p. 7).

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within the meaning of the Sixteenth Amendment. It is conceded that the income was derived from property held by the estate and was paid to the taxpayer. A receipt of money by a beneficiary from the income of an estate has long been recognized as a receipt of "income" within the meaning of the Sixteenth Amendment. *Irwin* v. *Gavit*, 268 U.S. 161; *Helvering* v. *Butterworth*, 290 U.S. 365, 368; *Smith* v. *Westover*, 191 F. 2d 1003 (C.A. 9); *Carlisle* v. *Commissioner*, 165 F. 2d 645 (C.A. 6); cf. *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431. The Code merely places the tax burden of the estate's income on the recipient of that income rather than on the estate, which is, in this case, only a conduit.

CONCLUSION

The decision below is correct. There is no conflict of decisions and no other reason for review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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NOVEMBER 1964.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 102. GIFTS AND INHERITANCES.

(a) *General Rule.*—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

(b) *Income.*—Subsection (a) shall not exclude from gross income—

* * * *

(2) where the gift, bequest, devise, or inheritance is of income from property, the amount of such income.

* * * *

SEC. 641. IMPOSITION OF TAX.

(a) *Application of Tax.*—The taxes imposed by this chapter on individuals shall apply to the taxable income of estates or of any kind of property held in trust, including—

* * * *

(3) income received by estates of deceased persons during the period of administration or settlement of the estate; and

* * * *

SEC. 643. DEFINITIONS APPLICABLE TO SUBPARTS A, B, C, AND D.

(a) *Distributable Net Income.*—For purposes of this part, the term "distributable net income" means, with respect to any taxable year, the taxable income of the estate or trust computed with the following modifications—

* * * *

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(b) *Income.*—For purposes of this subpart and subparts B, C, and D, the term "income", when not preceded by the words "taxable", "distributable net", "undistributed net", or "gross", means the amount of income of the estate or trust for the taxable year determined under the terms of the governing instrument and applicable local law. * * *

(c) *Beneficiary.*—For purposes of this part, the term "beneficiary" includes heir, legatee, devisee.

SEC. 661. DEDUCTION FOR ESTATES AND TRUSTS ACCUMULATING INCOME OR DISTRIBUTING CORPUS.

(a) *Deduction.*—In any taxable year there shall be allowed as a deduction in computing the taxable income of an estate or trust (other than a trust to which subpart B applies), the sum of—

(1) any amount of income for such taxable year required to be distributed currently * * *

* * * *

but such deduction shall not exceed the distributable net income of the estate or trust.

* * * *

SEC. 662. INCLUSION OF AMOUNTS IN GROSS INCOME OF BENEFICIARIES OF ESTATES AND TRUSTS ACCUMULATING INCOME OR DISTRIBUTING CORPUS.

(a) *Inclusion.*—Subject to subsection (b), there shall be included in the gross income of a beneficiary to whom an amount specified in sec-

tion 661(a) is paid, credited, or required to be distributed (by an estate or trust described in section 661), the sum of the following amounts:

(1) *Amounts required to be distributed currently.*—The amount of income for the taxable year required to be distributed currently to such beneficiary, whether distributed or not. If the amount of income required to be distributed currently to all beneficiaries exceeds the distributable net income (computed without the deduction allowed by section 642(c), relating to deduction for charitable, etc., purposes) of the estate or trust, then, in lieu of the amount provided in the preceding sentence, there shall be included in the gross income of the beneficiary an amount which bears the same ratio to distributable net income (as so computed) as the amount of income required to be distributed currently to such beneficiary bears to the amount required to be distributed currently to all beneficiaries. For purposes of this section, the phrase "the amount of income for the taxable year required to be distributed currently" includes any amount required to be paid out of income or corpus to the extent such amount is paid out of income for such taxable year.

* * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964 –

No. 507

MABEL DAVIS JAMES, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

Respondent's opposition to the petition herein should not, for the following reasons, be given more than a minute amount of weight on the scales being balanced.

1. It is significant that although the Tax Division of the Department of Justice[1] asked for and obtained a three week extension of time to prepare its brief in

[1] All Government counsel with the exception of the Solicitor General of the United States, Archibald Cox, Esq., are assigned to and are a part of the Tax Division of the Department of Justice, and none are a part of the Solicitor General's Office.

opposition herein, it has filed a cursory one and one-half page argument which makes no pretense whatever of responding to any of the reasons contained in the petition setting forth why the writ should issue. This is true with respect to Points I, II and III[2] of the petition. Instead the Respondent has merely argued that the decision below is correct, and attempted to support that conclusion by posing and then answering a secondary question first—whether an estate's income is taxable to the "recipient" under Section 662 of the Internal Revenue Code of 1954. Then, after assuming the answer to the very question before the Court—whether a widow's allowance is income within the meaning of that term as used in the Sixteenth Amendment—the Tax Division poses its second question which is "whether such a tax is constitutional." That is, the Respondent is telling the Court that the question before it is whether a tax on *income* is constitutional.

But surely it is clear that, along with the inability to answer any of the reasons set forth in the petition why a writ should issue, the mere posing of such a

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[2] Thus, the Respondent made no effort to show that the decision of the court of appeals below does not conflict with this Court's decision in *Tank Truck Rentals* v. *Commissioner*, 356 U.S. 30 in that the former decision has frustrated the public policy of Arizona in granting widow's allowances. Nor did it make any attempt to point out that *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 had not been misconstrued when the court of appeals simply held that all accessions to wealth are income or that the payment of a widow's allowance is an accession to wealth when paid from an estate's income. And finally a total silence also confronts the reasons set forth in Point I of the petition why the issues herein are important, involve large numbers of taxpayers and substantial amounts of revenue, and can be expected to generate a great volume of tax controversy.

"question" constitutes powerful support for the conclusion that Respondent cannot show that a widow's allowance is income within the meaning of the Sixteenth Amendment.

Here the question is the same as that presented to the court of appeals and the district court. It is whether a *widow's allowance,* whether paid from income *or* corpus, is income as that term is used in the Sixteenth Amendment. And that question cannot be answered by posing and answering another question which assumes that the item *is* income—whether an amount paid from an estate's income is income to the recipient under Section 662 of the Internal Revenue Code of 1954. Such an approach is actually nothing more than an attempt to determine the nature of an item in the hands of the recipient (whether income or not) by referring back to its nature in the hands of the estate or other payor. Such a reasoning process is error because there is not, as the court of appeals once conceded itself,[3] any relevant relationship between the nature of an item (whether income or not) in the hands of an estate or other payor and its nature in the hands of a recipient. And any attempt to answer the question of whether a widow's allowance is income under the Sixthteenth Amendment by concluding that it is because it was paid out of the income of an estate constitutes an outright begging of the primary question before the Court. A receipt is not income under the Constitution because it was income to someone else or simply because it is assumed to be income. It is only income under the Constitution if it (the amount received by the taxpayer) fits into the concept of income as determined by this Court. Because that is

[3] See ftnt. 1 at page 3 of the petition herein.

the one issue which the Respondent could not or would not discuss in the court of appeals, the latter had no choice, if it was going to rule for the Respondent, other than to rely on the latter's reasoning and hold that a widow's allowance is income to the widow if it was paid out of the estate's income.

Furthermore, even if it were possible to answer the primary question of whether a widow's allowance is income to a widow under the Constitution if paid from an estate's income by invoking the provisions of Section 662 of the Internal Revenue Code of 1954, the Government still has no case because Section 662 does not impose an income tax on the recipient of a widow's allowance where the payment is made from an estate's income. The conclusion that Section 662 does so is based on the erroneous conclusion that the recipient of a widow's allowance is a "beneficiary" within the meaning of the latter term as used in Section 643 (c). This is so because Section 662, imposing the tax, applies only to amounts paid by an estate to a "beneficiary." Yet Section 643 (c) simply defines a beneficiary as including an "heir, legatee, devisee." And it is this lack of coverage which forces the Respondent to reach out and argue that since the petitioner received payments from the estate by virtue of state law, "she was thus a *statutory* beneficiary[4] of the estate."

Thus, not only does Section 662 not provide an answer to the fundamental question of whether a widow's

[4] Although the Respondent made the same contention (that the widow was a statutory beneficiary) in the court of appeals, the latter did not so hold or state. Rather, the furthest the court of appeals was willing to go was to state that: "We think that the widow's position is *much closer* to that of a 'beneficiary' of the estate than to that, for example, of a creditor" (Pet. 5a).

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allowance paid from an estate's income constitutes income to the widow under the Sixteenth Amendment, it also does not provide an answer to the question posed by the Respondent. Section 662, as limited by Section 643 (c)'s application only to a "beneficiary", does not state that the recipient of a widow's allowance is a beneficiary who must pay income tax thereon.[5]

2. Nor do the five cases cited by the Respondent at pages 4 and 5 of its response (none of which were relied on or cited by the court of appeals) sustain the proposition that the Constitution allows the taxation of a widow's allowance when paid from an estate's income. In the first place none of the five cited cases deal with the question of whether a *widow's allowance,* if paid from the income of an estate, is income under the Constitution.[6] Secondly, none of the five cases even support the principle for which each was cited, i.e., "a receipt of money by a *beneficiary* from the income of an estate has long been recognized as a receipt of income within the meaning of the Sixteenth Amendment."

Irwin v. *Gavit,* 268 U.S. 161, held that a receipt of money by a beneficiary from the income of a *trust* was taxable to the trust beneficiary. The case distinguished between a gift, bequest or devise of property *and* a gift, bequest or devise of a right to income from property.

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[5] Even the regulations under Code Sec. 662 are silent on taxability of the allowance to the widow. Treas. Reg. § 1.662 (1954).

[6] If *Irwin* v. *Gavit,* 268 U.S. 161 (1925) had so decided in 1925, then *Buck* v. *McLaughlin,* 48 F. 2d 135 (1931), decided six years later and holding that a widow's allowance did not constitute taxable income under the Constitution whether paid from income or corpus would have been contra. Yet the Government, which lost the *Buck* v. *McLaughlin* case, *supra,* did not bother to file a petition for a writ of certiorari in the latter case.

The rule of the case was subsequently incorporated into Section 22(b)(3) of the 1939 Internal Revenue Code by an amendment in 1942.[7] Section 22(b)(3) of the 1939 Code is the predecessor to Section 102(b) of the 1954 Internal Revenue Code which latter section has not been relied on herein either by the Court of appeals or the Respondent.[8] Therefore, how *Irwin* v. *Gavit, supra,* could have any application here, the petitioner fails to see.

Helvering v. *Butterworth,* 290 U.S. 365, held that a *trust* was entitled to a deduction (under Section 219 of the Revenue Act of 1924 so providing) for the amount of its income which was currently to its beneficiary and that "a widow who accepts the provisions of a husband's will and receives part or all of the income from an established trust in lieu of her statutory rights [is] a beneficiary within the ambit of the statute."[9]

---

[7] "Under the existing law, the value of property acquired by gift, bequest, devise, or inheritance, but not the income therefrom, is excluded from gross income by the provisions of section 22 (b) (3) of the Code. This section has been construed as not requiring the exclusion from gross income of amounts received under a gift, bequest, or devise of a right to income from property. *Irwin* v. *Gavit* (268 U.S. 161 (1925)). This construction of the existing law is now written into the bill for the sake of clearness." H.R. Rep. No. 2333, 77th Cong., 2d Sess. 66-67; Sen. Rep. No. 1631, 77th Cong., 2d Sess. 70.

[8] Petitioner, of course, did not have any "right to income" within the meaning of the *Irwin* v. *Gavit, supra,* rule, but merely a statutory right to a widow's allowance. For example, she could not have demanded that the Superior Court of Arizona order the widow's allowance be paid out of the income of the estate. Indeed there is a serious question whether the Superior Court has the power to so order a widow's allowance to be paid from an estate's income. See *Title Ins. & Trust Co.* v. *Comm.,* 25 B.T.A. 805.

[9] 290 U.S. 369.

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In *Smith* v. *Westover,* 191 F. 2d 645 (C.A. 9) it was held that the taxpayer, a beneficiary of a *trust,* had received a distribution of trust income and not a distribution of a trust corpus since the trust had current net income in excess of the amount that was distributed to her. Such trust income was taxable to the trust beneficiary under the applicable statute.

And in *Carlisle* v. *Commissioner,* 165 F. 2d 645 (C.A. 6) the taxpayer was the residuary *legatee* of an estate. Prior to its final distribution the estate sold some securities and realized a capital gain thereon. The taxpayer claimed that what she received was a distribution of the residuary corpus of the estate, including that portion which represented the capital gain realized from the said sale. It was held that the taxpayer-legatee had received a distribution of estate income which had become payable during the taxable year and that the statute provided that it was taxable income to her.

In short, not one of the foregoing four cases supports the respondent's statement that" a receipt of money by a *beneficiary* from the income of an *estate* has long been recognized as a receipt of 'income' within the meaning of the Sixteenth Amendment." None of the cases even discussed the issue of whether the disputed payment was income under the Constitution. Therefore, how can the Respondent cite such cases as holding that there was no Constitutional barrier to their taxation as income? And when it is further noted that three of the cases involved payments from a *trust,* how can the Respondent cite the cases as involving beneficiaries of an estate? And how does the fourth case support the statement when it involved a legatee rather than a beneficiary?

The fifth case cited by Respondent as its Constitutional support was *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431, which was preceded by a *cf.* However, the said case cannot be said to be sufficiently analogous to support the statement that it has *long been recognized* that a receipt of money by a beneficiary from the income of an estate is income *"within the meaning of the Sixteenth Amendment"* because this Court expressly rejected a Constitutional interpretation.[10] Indeed it is fair to ask, in view of this Court's express renunciation of a constitutional decision, why Respondent cited the case as constituting constitutional support?

CONCLUSION

Since there is no specific basis for the Tax Division's opposition to the writ, the question remains as to whether its mere opposition is entitled to any weight. That is, should the mere fact that the Respondent opposes certiorari in a tax case be given weight by this Court on the assumption that the former makes a conscious broad collective policy judgment based on an overall view of tax law and is not myopically preoccupied with winning the disputed case, and that, therefore, its recommendations are more objective? As will be shown below, the answer is no.

In *Ryan* v. *United States,* October Term, 1964, No. 12, the Tax Division filed a brief in opposition to a petition for a writ on December 26, 1963. It told this Court therein, at page 7, that "there is no need for uniformity among the circuits on the relatively unimportant ques-

[10] The Court said at 348 U.S. 429: "It is conceded by the respondents that there is no constitutional barrier to the imposition of tax on punitive damages. Our question is one of statutory construction: are these payments comprehended by § 22(a)."

tion involved. The petition for a writ of certiorari should be denied." However, "subsequent to the filing of the said brief in opposition in this Court, the Government was apprised of the decision by the Court of Appeals for the Third Circuit in *United States et al.* v. *Max Powell and William Penn, Inc.,*" in which it lost the same tax issue. Consequently, on January 15, 1964, in a Supplemental Memorandum filed in *Ryan, supra,* the Tax Division hastily withdrew its opposition to the petition which it had three weeks earlier labeled as raising a relatively unimportant issue. Later, and not surprisingly so, the Government then filed a petition itself in the *Powell and Penn* case, *supra,* which it had lost. (October Term, 1964, No 54). Thus, while the Tax Division acted as any good advocate, it is perfectly clear that the Respondent's opposition to a petition for a writ of certiorari is entitled to no more weight than that accorded to any other advocate whose primary concern is the outcome of the single case involved. This is particularly true in the instant case where the Respondent has failed to respond to the reasons assigned in the petition.

Respectfully submitted,

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